National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: February 26, 1996

TO: Ronald M. Sharp, Regional Director, Region 18

FROM: Barry J. Kearney, Associate General Counsel, Division of Advice

SUBJECT: Amalgamated Transit Union (Greyhound Lines, Inc.) Case No. 18-CB-3459, 18-CA-13197

524-5090-8314, 524-5090-8342-5000, 536-2581-3307, 548-6050-6701-5000, 548-6050-6701-7500

These cases were submitted for advice as to (1) whether the Union violated Section 8(b)(1)(A) and (2) by requesting the Charging Party's discharge for "failure to make appropriate due[s] payment arrangements" when in fact such arrangements had been made, and without complying with its obligations under California Saw & Knife Works[(1)] and Philadelphia Sheraton Corp.[(2)]; and (2) whether the Employer violated Section 8(a)(1) and (3) by discharging the Charging Party pursuant to the union-security clause where the Employer was on notice that the Union's discharge request might be unlawful.

FACTS

The Charging Party, Dallas Howell, was hired by Greyhound Lines, Inc. (the Employer) on March 2, 1990, as a strike replacement bus driver during an ATU nationwide strike. Slightly more than three years later (on about April 20, 1993), the strike ended with a new six-year collective-bargaining agreement containing a union-security clause.

On June 14, 1993, the Union notified the Employer that all employees were expected to join the Union or pay the dues-equivalent by June 28 or it would request their termination. Sometime in June, the employees were notified of this deadline for "signing up with" the Union. On June 23, Howell went to a representative of Local 1225[(3)] and obtained and filled out an Application for Membership form to which he added the words "as a fee objector only" and "I will pay due's [sic] by U.S. mail only." He also signed a dues checkoff form but struck out the language authorizing payroll deduction and added "I will pay by U.S. mail only."

The Union representative then also signed these forms.

The Employer wrote to the employees in August 1993 informing them of their right to choose among becoming full union members, financial core members or fee objectors in order to satisfy their union-security obligation and avoid termination. Howell responded on September 2 in a letter pointing out that Union membership was not a condition of employment when he originally came to work at Greyhound and stating that he would "not join the ATU." He ended his letter by saying that he hoped the "last step" mentioned in the Employer's letter (termination) would not be necessary.

On September 1, 1993, the Union sent the Employer a letter with a list of employees, including Howell, who (the Union claimed) had not yet joined the Union or indicated that they would pay the dues equivalent. The Union requested that the Employer notify these individuals that they would be "pulled from service" if they had not complied by September 30. The Employer sent a copy of the Union's letter to each employee on the list and posted a notice containing this information and deadline at the Minneapolis terminal.

A Union bulletin was also posted in September 1993 explaining the union-security obligation and the three choices -- full union member, financial core employee and fee objector -- for satisfying this obligation. The notice stated that fee objectors would be charged:

...the percentage of the initiation fee (which is currently being waived) and percentage of uniform periodic dues charged by the

Union that is used for activities necessary to performance of the Union's duties as exclusive bargaining representative.

Howell responded to this bulletin by a September 17 letter informing the Union that he would not "join," but would "under protest" pay "protection pay," and only through the U.S. mail. He further said that the Union could "invoice" him at a specified address on the first of each month.

The Employer wrote to the employees on November 4, 1993, advising them that on December 6, at the request of the Union, it would begin removing from service employees who had not made "appropriate arrangements." Howell responded with an undated letter to the Union asserting that the differences between full member, financial core employee and fee objector had never been explained to him by the Union. He also requested that the Union "please enter my option choice under protest as [a] fee objector employee." Howell sent the Employer a copy of this letter. On December

2, Howell received a copy of an Employer memorandum to managers regarding the employees who still allegedly had not made dues payment arrangements with the Union.[(4)] Howell stated that he took no action after receiving this memorandum because he felt he had "exhausted all avenues of communications" and the Employer and Union had not responded to any of his previous letters. December 6 passed without any drivers being pulled from service.

During January 1994,[(5)] the Union[(6)] alleges that it posted a document on the Union bulletin board informing employees of the amount of dues (two times the hourly rate plus $7.40 for full union members, and "81%" for financial core and fee objector employees). On January 27, a letter was deposited in the workplace message box of each employee who had allegedly not made application to the Union, advising him or her to select one of the three choices for participation (member, financial core employee or fee objector) by January 31. Howell was on vacation at this time and claims he never received this letter.

The Union and Employer met on January 28 with five employees (including Howell) who allegedly had not yet made any selection regarding membership or dues payment arrangements. During the first part of the meeting the three types of membership were discussed. Howell did not state that he had already registered as a fee objector. Prior to leaving the meeting early because of a family emergency, Howell said only that he "[did] not care to join the Union."[(7)]

On January 31, the Union requested that the Employer invoke the union-security clause. The Employer requested and received a final list of employees (Howell and one other) to be pulled from service. On February 7, Howell received a phone call from the Employer informing him that he was suspended until he complied with the union-security clause. On February 10, he received another call from the Employer informing him that he was being discharged. On the day he received the latter phone call, Howell met with the Employer and signed a discharge form, dated February 11, which indicated that the reason for termination was "failure to make appropriate due[s] payment arrangements" with the Union.

On July 14, Howell filed charges alleging that (1) the Union violated Section 8(b)(1)(A) and (2) by demanding his discharge despite his offer to pay legally required dues and fees, and (2) the Employer violated Section 8(a)(1) and (3) by discharging him for not paying dues when the Union was refusing to allow him to pay the dues. In August, the Region found merit to both charges and informed the parties of this determination. Unsuccessful settlement discussions took place thereafter.

For more than six months after Howell was discharged, the other employees who had claimed fee objector status, but who had continued working, were not billed by the Union because the local Union had not completed its audit. On August 24, the Union sent fee objectors a letter with a copy of an audit of local Union expenditures for the quarter ending March 31, 1994. The letter described the methodology used to determine the 98.8 percent of local Union dues and 81.94 percent of International per capita tax deemed chargeable to fee objectors.[(8)]

Howell was offered reinstatement, not contingent on settlement, and returned to work on September 25. After he returned to work, the Union informed Howell of the monthly dues for each of the categories of membership in and that payments were due on the 15th of each month. Howell responded in a November 11 letter indicating that he would make the appropriate payment for fee objector employees on the 15th of each month via Greyhound mail. Howell expressed a wish that his dues go to a charitable organization and not be used for union activity. The first actual payment by Howell was for October 1994. He has continued to be employed and to pay dues.

ACTION

We conclude the Union violated Section 8(b)(1)(A) and (2) by causing the Employer to suspend and terminate Howell for non-compliance with the union-security requirement when in fact he was in compliance, and without satisfying its duties under California Saw and Philadelphia Sheraton. We further conclude that the Employer violated Section 8(a)(1) and (3) by discharging Howell when it had reason to suspect the validity of the Union's discharge demand.

1. The charge against the Union

Although the Howell openly made known his desire never to belong to the Union, he made it clear on a number of occasions that he wished to be a fee objector and that he would pay the necessary dues equivalent through the U.S. mails when billed. Therefore, the Union violated Section 8(b)(1)(A) and (2) when it requested his discharge for "failure to make appropriate due [s] payment arrangements" when in fact he had indicated his choice of an appropriate arrangement for paying as a fee objector. (9)

The Union breached its fiduciary duty by failing to acknowledge Howell's declaration of fee objector status. A union seeking to enforce a union-security clause against an employee has a fiduciary duty to deal fairly with that employee.(10) At a minimum, this includes the duty to honor Howell's decision to become a Beck objector. We think the Union as a fiduciary should recognize that the economic consequences of failure to comply with a union-security clause are so drastic that it should be slow to act on the assumption that an employee has knowingly decided to sacrifice his job to avoid paying even dues-equivalent. Before requesting Howell's discharge, the Union should have taken steps to ascertain the accuracy of its records concerning Howell's status. Thus, the Union violated Section 8(b)(1)(A) and (2) by requesting Howell's discharge when he was in compliance.

The Union also violated Section 8(b)(1)(A) and (2) by requesting the discharge of Howell prior to fulfilling its obligations under California Saw and Philadelphia Sheraton.

a. California Saw

In California Saw, the recent Board case construing CWA v. Beck,(11) the Board held that a union's duty of fair representation requires that when or before a union seeks to enforce a union-security clause, it should inform the employee that he has the right to be a nonmember and that nonmembers have the right:

(1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections.(12)

In addition, if the employee chooses to object, the union must apprise the employee of "the percentage of the reduction, the basis for the calculation, and the right to challenge these figures."(13)

In the present case, prior to seeking the Charging Party's discharge, the Union informed Howell of his right to remain a nonmember and to object to, and obtain a reduction in fees for, union activities not germane to the Union's duties as bargaining agent. At no time prior to the discharge, however, did the Union provide Howell with enough information to enable him to determine the financial consequences (i.e., actual charges) of choosing fee objector status.(14) Although Howell chose to object, he was never informed prior to his discharge of the percentage of the reduction,(15) the basis for this calculation or the right to challenge these figures. Thus the Union failed to satisfy its obligation under the duty of fair representation by seeking Howell's discharge without complying with the notice requirement of California Saw.

b. Philadelphia Sheraton

Upon receipt of a nonmember's objection, a union has a fiduciary obligation to inform the employee what his obligations are

and what action is necessary to satisfy these obligations.(16) A union is required to give the employee reasonable notice of the delinquency, including a statement of the precise amount and months for which dues are owed, as well as an explanation of the method used in computing such amount.(17) The union must also specify when such payments are to be made and make it clear that discharge will result from failure to pay.(18) In the present case, the Charging Party was fired before he was ever presented with any bill whatsoever. It follows that he was never told the precise amount owed, the period for which dues were owed, the method used to compute the amount owed, or the date when payment was due. In such circumstances, request for his discharge was unlawful.

2. The charge against the Employer

The Board has held that an employer does not violate Section 8(a)(3) by complying with a union's request that it discharge an employee pursuant to a union-security clause unless the employer has reasonable grounds to believe, prior to such discharge, that the union's request for that discharge was improper.(19) Where an employer has reasonable cause to suspect that a union's request is invalid, it must investigate the propriety of the request before acting upon it.(20)

The employer's duty to inquire before proceeding with a discharge request is not absolute, but varies depending on the existence or strength of indications that the request may be unlawful.(21)

Here, although the Employer contends generally that the Charging Party never voiced a Beck objection, the evidence shows that the Employer was set a copy of the Charging Party's letter to the Union claiming fee objector status. Therefore, the Employer was on notice of a discrepancy between Howell's letter claiming fee objector status and the Union's allegation that Howell refused to make a selection of either full membership, financial core or fee objector status.(22) The Employer was therefore required to investigate the validity of the Union's request before discharging Howell for failure to make "appropriate due[s] payment arrangements." Thus the Employer violated Section 8(a)(1) and (3) of the Act when it discharged Howell even though it was on notice that the Union's discharge demand might have been invalid.

In sum, we conclude that complaint should issue, absent settlement, alleging that (1) the Union violated Section 8(b)(1)(A) and (2) by causing the Employer to suspend and terminate Howell for non-compliance with the union-security provision when in fact he was in compliance, and without satisfying its duties under California Saw and Philadelphia Sheraton; and (2) the Employer violated Section 8(a)(1) and (3) by discharging Howell when it had reason to suspect the validity of the Union's discharge demand.

B.J.K.

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[1] 320 NLRB No. 11 (December 20, 1995).

[2] 136 NLRB 888 (1962), enfd. sub nom. NLRB v. Hotel & Restaurant Employees Local 568, 320 F.2d 254 (3d Cir. 1963).

[3] Before January 1, 1994, the certified collective bargaining representative, the Amalgamated Council of Greyhound Local Unions (Council), was comprised of four local unions, including Local 1225. As of January 1, 1994, the Council's four locals were transferred to direct membership in the Council under the trusteeship of the International Union and operated as a national local union designated as Local 1700.

[4] The memorandum stated that the managers should meet with each of the employees to determine their intentions regarding Union dues. Employees who said they would not pay dues were to be pulled from service until payment arrangements were made. If an employee said arrangements had already been made, the driver was to continue working while the information was verified.

[5] All dates hereinafter are 1994.

[6] As of January 1, 1994, Local 1700 has been acting as the representative of the Greyhound employees. See fn. 3, above. The Union acknowledges that some of the records may have been incomplete after the membership records of the four locals were transferred to Local 1700.

[7] The Union's position statement alleges that at this meeting Howell said that he would never join the Union and that the Union would "never get any money" out of him. However, there are no affidavits that support this assertion.

[8] An International Legal Notice, analysis of expenses and schedule of calculations were also attached. We note that the Union indicated at this time that only fee objectors would receive a reduction in dues, whereas the Union's notice posted in January 1994 indicated that both core members and fee objectors would receive a reduction. This discrepancy is not relevant to the merits of this case, however, because it is clear that Howell is a fee objector.

[9] See, e.g., H.C. Macaulay Foundry Co., 223 NLRB 815, 818 (1976), enfd. 553 F.2d 1198 (9th Cir. 1977) (Union violated 8(b)(1)(A) and (2) when it mistakenly requested discharge of employee for failure to pay dues where employee had been out on sick leave and reasonably believed he did not have to pay until the first pay date following his return to work).

[10] Id.

[11] 487 U.S. 735 (1988).

[12] California Saw, 320 NLRB No. 11, slip op. at 10.

[13] Id.

[14] California Saw also requires the Union to apprise employees of internal union procedures (if it has any) for filing objections. See 320 NLRB No. 11, slip op. at 10. In the present case, however, it does not appear that the Union has such procedures.

[15] Although the Union posted a notice in January 1994 with "81 percent" marked next to "fee objector," it was unclear from the notice what the "81 percent" referred to. Apparently it represents the portion of the International's per capita tax chargeable to objectors. In any event, the Union clearly did not inform Howell as to the percentage of reduction for the local Union's dues because the local's audit was not yet complete at the time of his discharge.

[16] See Philadelphia Sheraton, 136 NLRB at 896.

[17] Western Publishing, 263 NLRB 1110, 1112 (1982); Teamsters Local 122 (August Busch), 203 NLRB 1041, 1042 (1973), enfd. 502 F.2d 1160 (1st Cir. 1974).

[18] Distillery Workers Local 38 (Schenley Distillers), 242 NLRB 370 (1979), enfd. 642 F.2d 185 (6th Cir. 1981).

[19] See Forsyth Hardwood Co., 243 NLRB 1039, 1040 (1979); Conductron Corp., 183 NLRB 419, 427 (1970).

[20] See, e.g. Western Publishing Co., supra, 263 NLRB at 1113 (employee's protest and tender of dues to the union in the presence of the employer was sufficient to put the employer on notice that there was confusion at least as to deadline for payment); see also R.H. Macy & Co., Inc., 266 NLRB 858, 859 (1983).

[21] See California Saw, 320 NLRB No. 11, slip op. at 23, and cases cited therein.

[22] This is true even though Howell did not inform the Employer at the January 27 meeting or during his discharge meeting that he had already registered as a fee objector.